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No. 82-451

In the Supreme Court of the United States

OCTOBER TERM, 1982

DANIEL S. COSTELLO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the Court of Claims' dismissal of their action to recover "just compensation" for the alleged taking of avigation easements over their properties by aircraft operating out of Washington National Airport.[1] The Court of Claims correctly held that this suit was barred by the six-year statute of limitations contained in 28 U.S.C. 2501 (Pet. App. 1a-8a).

1. Petitioners filed this action in May 1980, alleging that flights over their properties by aircraft operating out of Washington National Airport had so impaired their use and enjoyment of their properties that they were entitled to compensation under *United States* v. *Causby*, 328 U.S. 256 (1946) (Pet. 4-5; Pet. App. 2a). The United States responded with a motion for summary judgment based on

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[1]The overflights of which petitioners complain generally are not by United States' aircraft nor are they crewed by federal personnel (Pet. App. 2a). Washington National Airport, however, is federally-owned and is operated by the Federal Aviation Administration ("FAA").

affidavits showing that no significant change in frequency, altitude, flight paths, or types of aircraft operating out of National had occurred since 1966, and that the airport's hours of operation had remained "largely unchanged" since 1967 (Pet. App. 4a-5a). Petitioners offered no affidavits of their own to controvert the facts set out by the United States (Pet. App. 6a). Accordingly, on the uncontested facts, the Court of Claims held that "a taking occurred, if at all, no later than 1967" (Pet. App. 5a).[2]

2. The failure of petitioners to meet their burden of demonstrating a triable issue of fact concerning the date of the alleged taking is dispositive of this case. See Pet. App. 7a; see also Fed. R. Civ. P. 56(e). Each of the cases on which petitioners rely (Pet. 6-15) involves the question of ascertaining the date of taking where the government's conduct has imposed an *increasing* burden on the plaintiffs' properties. See *United States* v. *Dickinson*, 331 U.S. 745, 746-749 (1947); *Klein* v. *United States*, 152 Ct. Cl. 221, 223-224, cert. denied, 366 U.S. 936 (1961); *Petersen* v. *Port of Seattle*, 94 Wash. 2d 479, 486, 618 P.2d 67, 69, 71 (1980) (en banc).[3] By contrast, petitioners made no attempt to prove

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[2]The court followed its prior decisions to the effect that (Pet. App. 3a-4a)

> an avigation easement is taken when aircraft are first operated regularly and frequently at low altitudes over a parcel of land with the intention of continuing such flights indefinitely.

[3]Petitioners rely on *Petersen* v. *Port of Seattle*, *supra*, as establishing a rule that "there is no statute of limitations for filing a constitutional claim for a taking of property by aircraft overflights" (Pet. 14). In *Petersen*, however, the en banc Washington Supreme Court was construing Washington State law. See 94 Wash. 2d at 486, 618 P.2d at 70. In any event, this Court already has applied the federal statute of limitations, 28 U.S.C. 2501, to bar untimely claims for just compensation under the Fifth Amendment of the United States Constitution. *Soriano* v. *United States*, 352 U.S. 270, 271 (1957).

that any change in flight paths, increase in flights, or use of appreciably noisier aircraft had occurred since 1967. See Pet. App. 6a. Accordingly, the Court of Claims correctly held that petitioner's action, which was filed in 1980, was barred by the six-year statute of limitations contained in 28 U.S.C. 2501. See *Lacey* v. *United States*, 595 F. 2d 614, 618-619 (Ct. Cl. 1979). See also *Branning* v. *United States*, 654 F. 2d 88, 101 (Ct. Cl. 1981); *Davis* v. *United States*, 295 F. 2d 931, 932-934 (Ct. Cl. 1961); *Bacon* v. *United States*, 295 F. 2d 936, 937-939 (Ct. Cl. 1961).

Petitioners' reliance (Pet. 4, 7-8) on recent changes in FAA regulations governing the operation of National Airport is wholly misplaced. The new rules are intended to reduce the noise impact of National's operations without substantially changing the operational character of the airport.[4] Recent governmental actions intended to *reduce* the burden on petitioners' properties—the very interference with their property rights that formed the basis for their allegation of a taking—surely can neither create nor revive that cause of action.

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[4]The proposed rules cited by petitioners (Pet. 7-9) are now final. 46 Fed. Reg. 58036 *et seq.* (1981), 14 C.F.R. Parts 93 and 159. The final rules reduce the number of air carrier operations per hour, limit the total number of passengers per year, and impose a noise level based curfew that permits only "relatively quiet aircraft" to operate between the hours of 10 p.m. and 7 a.m. See 46 Fed. Reg. 58038 *et seq.* (1981).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

REX E. LEE
Solicitor General

NOVEMBER 1982

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[5]The Court recently denied a petition for a writ of certiorari filed on behalf of counsel for petitioners in this case that presented virtually the same issues raised here. *Joseph* v. *Helms*, No. 81-1757 (June 14, 1982).

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